No. 96-1037

In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,
a federally recognized Indian Tribe,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,

Respondent.

On Writ Of Certiorari To The
Oklahoma Court Of Appeals

BRIEF OF AMICUS CURIAE STATES OF SOUTH DAKOTA, ALASKA, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, LOUISIANA, MASSACHUSETTS, MICHIGAN, MONTANA, NEW HAMPSHIRE, NEW YORK, UTAH, VERMONT AND WISCONSIN IN SUPPORT OF RESPONDENT

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INTRODUCTION

The States of South Dakota, Alaska, California, Connecticut, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New York, Utah, Vermont and Wisconsin, respectfully submit a brief amicus curiae in support of Respondent pursuant to Supreme Court Rule 37.

INTEREST OF AMICI STATES

This case differs substantially from other Indian law cases in which the interest of the States arises from the *presence* of Indian country. In this case, the interest of the Amici States lies in ensuring equal treatment of commercial business enterprises conducted by tribes when those enterprises move *beyond* Indian country and in ensuring that tribes may be held directly accountable for compliance with generally applicable, nondiscriminatory state laws with respect to such activities. The States thus have a strong interest in allowing their courts jurisdiction over Indian commercial enterprises when those commercial enterprises move beyond reservation boundaries, just as the state has an interest in assuring that other commercial enterprises which commit civil wrongs are subject to the civil jurisdiction of the state courts. They also have a strong interest in being able to enforce their and their local governmental subdivisions' laws against tribes, which otherwise apply to tribal non-Indian country transactions or activities, without either the need to resort to official capacity suits where prospective relief is at issue or to face the potential practical inability to obtain retroactive relief.

Petitioner has forthrightly argued that, if its claim is sustained here, an Indian tribe with a reservation in one state has sovereign immunity "Anywhere In The United States." *See* Brief for Petitioner at 26. According to the Bureau of Indian Affairs, there are "more than 550 federally recognized Tribes in the United States, including 223 village groups in Alaska." U.S. Department of the Interior, Bureau of Indian Affairs, On the Web, p. 3. Each of these tribes, under the theory offered by Petitioner and the United States, has unfettered sovereign immunity to operate commercially in each of the fifty states and could, under their theory, commit torts, breach contracts, and violate state law generally without recourse for the States as against the offending tribe itself. This result is unacceptable practically and unjustified doctrinally.

SUMMARY OF ARGUMENT

The Petitioner and the United States seek here to have this Court expand the doctrine of tribal sovereign immunity to off-reservation commercial transactions of tribes. The demand is without legal basis. Neither the tribe nor the United States cites any basis in the common law of the States or in international law to support this expansion of tribal sovereign immunity. Indeed, States are not immune from suit in sister states even when conducting governmental business, and a foreign state does not possess immunity from suit regarding its commercial transactions within the United States by virtue of federal law.

The claim of the Petitioner and the United States is, moreover, directly contrary to this Court's precedent which holds that off-reservation commercial enterprises of a tribe are not immune from state taxation.

The United States and the Petitioner also downplay the significance of this litigation. In fact, the legal claim made here is that each of the 320 federally recognized tribes may conduct commercial enterprises in each of the fifty states without fear of incurring a civil liability. The claim effectively extends not only to contractual relations but also to tort actions and violations of state law generally. As a result, the Petitioner and the United States invite this Court to endorse the establishment of tiny enclaves of immunity from state law created by each of the 320 tribes in each of the fifty states.

The States submit that public policy considerations strongly argue against the proposed unprincipled extension of tribal sovereign immunity to off-reservation commercial transactions.

ARGUMENT

I.

NEITHER PETITIONER NOR THE UNITED STATES HAS DEMONSTRATED THAT THE TRIBES POSSESSED SOVEREIGN IMMUNITY BEYOND INDIAN COUNTRY AS A MATTER OF COMMON LAW.

The argument of Petitioner and the United States before this Court is simply that because the tribes have always had sovereign immunity off-reservation and because Congress has not seen fit to divest the tribes of

that attribute, it must still exist. The fundamental flaw in their argument, however, is that neither common law nor Congress has ever recognized such immunity in favor of Indian tribes. This conclusion flows ineluctably from *Nevada v. Hall*, 440 U.S. 410, 414 (1979), where the Court explained that the doctrine of sovereign immunity "is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." The doctrine of sovereign immunity, the Court explained, protected the "immunity of a truly independent sovereign from suit in its own courts." *Id.* That concept had its origins in the feudal system in which each petty lord was subject to suit in the courts of a higher lord; since there was no lord higher than the king, the king was necessarily immune from suit.[1] Here, however, the issue is whether Petitioner, or tribes in general, has sovereign immunity from suits in the courts of another sovereign with respect to conduct admittedly subject to the latter's regulation.

A. There Is No Substantial Basis in International Law to Recognize Sovereign Immunity for Off-Reservation Commercial Transactions.

In seeking to discover the basis for the tribal and federal claim to sovereign immunity for off-reservation commercial transactions, we first turn to transactions of foreign nations in federal courts. In so doing, we recognize that Petitioner and the United States correctly deny

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[1] The idea that "the King could do no wrong" also supported the immunity of the king in his own courts. *Hall*, 440 U.S. at 415.

that the tribes can be classified as "foreign nations." Nonetheless, because they have failed to reveal the source of their theory with regard to the origin of off-reservation immunity, this Court's treatment of sovereign immunity claims by foreign nations provides a useful backdrop in answering the question presented.

This Court noted in *Hall*, 440 U.S. at 416, that the idea that a sovereign could not be sued in its own courts did not provide "support for a claim of immunity in *another sovereign's* courts." (Emphasis added.) The source of sovereign immunity in the courts of another sovereign must be found "either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.*

In *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 145-146 (1813), this Court found that the United States had, in fact, agreed as a matter of comity not to subject a foreign sovereign's warship to the jurisdiction of the federal courts. This Court also noted that the person of a sovereign would be immune from arrest or detention within a foreign territory, *id.* at 137, as would the foreign ministers of that country or the troops of a foreign sovereign passing through the country with the permission of the host sovereign. *Id.* at 138-139. The Court noted, however, that there might well be a distinction with regard to a "prince" who conducts commerce in a foreign country indicating the possibility that such a prince might well be subject to the jurisdiction of the United States courts.

> Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of

> the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern.

Id.

Despite the implications of this passage from the *Schooner Exchange*, this Court a century later in *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926), found that because the government of Italy owned a commercial vessel, the vessel was immune from suit in the United States courts. As described by Professor Lowenfeld, the case

> rested entirely on the Supreme Court's understanding of international law and precedent, without any reference to considerations of foreign policy or the desires of the United States Government. Indeed, in the *Pesaro* case itself, the State Department argued that immunity should not be granted to a commercial vessel in a claim arising out of a commercial transaction, but the Justice Department disagreed and declined to submit the State Department's opinion to the Court.

Andreas F. Lowenfeld, *Claims Against Foreign States – A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev.

901, 904 (1969). Two decades later, the Court affirmed the *Pesaro* holding without reference to international law

> solely on the basis that the State Department's certificate and request "must be accepted by the courts as a conclusive determination by the political arm of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations."

Id. at 905 (discussing *Ex Parte Peru*, 318 U.S. 578 (1943)).

In 1952, matters took a new turn. The State Department concluded that foreign sovereigns should *not* be immune from suit "in cases involving what it called 'private' or 'non-public' acts as contrasted with 'sovereign acts.' " *Id.* at 906. Essentially, the new approach, captured in the "Tate Letter" of May 19, 1952, responded to the

> widespread and increasing practice on the part of governments of engaging in commercial activities. . . .

44 N.Y.U. L. Rev. at 906 (quoting letter of Jack B. Tate of May 19, 1952). The practice then became for the State Department to advise the courts on whether to grant sovereign immunity based upon whether the transaction was a sovereign or public act or a private act. Therefore, from 1952 through 1976, the official policy of the State Department was that commercial transactions entered into by foreign powers were generally not entitled to sovereign immunity.

In 1976, the Foreign Sovereign Immunities Act of 1976 was enacted. The Act provides generally for actions against a foreign state based upon a commercial activity

carried on in the United States by the foreign state. 28 U.S.C. § 1605(a)(2). Sovereign immunity would not be recognized in such situations. It also provided for the waiver of a foreign state's immunity "by implication." *Id.* at § 1605(a)(1).

The history of a foreign sovereign's immunity from commercial transactions in United States courts thus is not consistent. It begins with an implication that such commercial transactions might subject the sovereign to the jurisdiction of United States courts, an implication repudiated a century later and then given new life by the State Department and finally Congress. The law of the United States is now clearly that foreign sovereigns are subject to jurisdiction for their commercial activities within the United States. The foregoing discussion reveals why Petitioner and the United States have adamantly declared that Indian tribes are not "foreign nations" for the purpose of sovereign immunity. *See* Brief for Petitioner at 26; Brief for the United States as Amicus Curiae Supporting Petitioner at 8. Quite clearly, this body of law does not support recognition by this Court of off-reservation sovereign immunity for commercial transactions.

B. Indian Tribes Cannot Claim Sovereign Immunity as "States."

Both Petitioner and the United States deny that tribes should be treated as "states" for the purpose of sovereign immunity law. *See* Brief for Petitioner at 24-25, 30; Brief for the United States at 8. They are forced to this position by *Nevada v. Hall*. In *Hall*, this Court found that whether

California recognized the sovereign immunity of Nevada with regard to a tort committed by a Nevada employee within California depended upon whether California desired to recognize that sovereign immunity as a matter of "comity." *See* 440 U.S. at 418, 425-427. The Court rejected the argument that California was bound by the Constitution to grant sovereign immunity to Nevada. It also sent a warning that the right of self-government might be implicated by an opposite conclusion. This Court noted:

> In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

Id. at 426. Plainly, treatment of Petitioner as a State in view of this Court's jurisprudence would result in affirmance of the judgment below.

C. There Is No Basis in American Law to Require States to Grant Sovereign Immunity to Tribes for Their Off-Reservation Commercial Activities.

It would be anomalous to recognize sovereign immunity for off-reservation commercial activities in view of the treatment of foreign nations and States by this Court and by Congress. The tribes certainly do not possess more "sovereignty" than do foreign nations. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) (the Framers did not have tribes "in view" when extending federal

court jurisdiction to controversies between States or citizens thereof and foreign states, citizens or subjects). The States' position is protected by the very text of the Constitution itself, together with the Tenth Amendment. *Cf. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 429 (1989) (plurality op.) (tribal inherent authority is less expansive than local government police powers); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-193 (1989) (tribes are not States).[2] Tribal power, on the other hand, is subject to complete defeasance by the United States. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Petitioner and the United States have failed to explain satisfactorily why tribes should have the benefit of the application of principles derived from feudal law in such a way as to confer tribes with a special benefit largely without precedent in the treatment of that feudal law by American courts.

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[2] The unique status of the United States and States under the Constitution is also relevant to the issue, not presented here, whether they are immune from unconsented suit in tribal court. Both federal and state governments have so argued successfully in lower federal courts. *See United States v. Yakima Tribal Court*, 806 F.2d 853, 860-61 (9th Cir. 1986); *Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996), *appeal docketed*, No. 96-35766 (July 18, 1996). As to States, finding such jurisdiction runs counter to their immunity from suit under the Eleventh Amendment in the courts of the tribes' immediate sovereign and would effectively expose them to the unreviewable authority of an extraconstitutional entity – authority that, for example, could be used to regulate States in a manner not permissible even to the federal government by virtue of the Tenth Amendment.

II.

PRECEDENT OF THIS COURT INDICATES THAT THE STATES MAY ENTERTAIN SUITS AGAINST INDIAN TRIBES ENGAGED IN COMMERCIAL ACTIVITIES OFF THE RESERVATION.

The essence of Petitioner and the federal government's argument, as demonstrated above, is not based on any historical analysis of the law of sovereign immunity as it relates particularly to commercial enterprises of Indian tribes or other entities. Instead, their theory proceeds upon the assumption that "the Constitution granted the United States the *sole power* to regulate relations with the Tribes. . . . " Brief for the United States at 12 (emphasis added); *see also* Brief for Petitioner at 30.

The United States thus contends that the States may not, consistent with the Constitution, exercise *any* jurisdiction over a private off-reservation individual's relationship with an Indian tribe. This Court has explicitly rejected this assumption. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-148 (1973), this Court held:

> At the outset, we reject – as did the state court – the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land."

The Court added that the states *did* have jurisdiction over tribal activities occurring off reservation, absent "express federal law to the contrary." *Id.* at 148. The Court stated:

> But tribal activities conducted outside the reservation present different considerations.

> authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake [v. Egan*, 369 U.S. 60, 75 (1962)]. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

Id. at 148-149. The Court accordingly rejected the argument that the commerce clause, *see id.* at 159, 161 (Douglas, J., dissenting), prohibited New Mexico from taxing a commercial enterprise, there a ski resort, operated by a tribe on off-reservation land leased from the federal government.

Mescalero Apache Tribe thus establishes that the States in fact do have jurisdiction over commercial enterprises of tribes off the reservation, and this Court has consistently adhered to that decision. *See, e.g., Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214, 2223 (1995) (principle that Indians and tribes are generally immune from state taxation "does not operate outside Indian country"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n.11 (1980). The United States, to be sure, admits that *Mescalero Apache Tribe* recognizes the authority of the state to tax commercial activities of tribes operating outside of Indian country. However, it argues that, although the States may have the right to "demand compliance with state law," Brief for the United States at 12, Petitioner's sovereign immunity nonetheless protects it from a suit to compel compliance with such law. The Government surprisingly relies upon *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991), for this proposition.

In *Potawatomi Tribe*, Oklahoma argued that a tribe should not be able to invoke sovereign immunity to prevent the collection of cigarette taxes because the cigarette sales did not occur on a "reservation." *Potawatomi Tribe*, 498 U.S. at 511. The Court's opinion extensively reviewed the question of sovereign immunity of the tribes. *Id.* at 508-510. The Court, in finding tribal immunity from liability for uncollected taxes, nevertheless did not simply state that sovereign immunity operated regardless of the transaction's locus. Instead, the Court quoted *Mescalero Apache Tribe* to the effect that state laws *could* be applied to a ski resort outside a reservation's boundaries operated by the tribe and that " 'absent express federal law to the contrary, Indians going beyond reservation boundaries have generally held subject to nondiscriminatory state law unless otherwise applicable to all citizens of the state.' " *Id.* at 511 (quoting *Mescalero Apache Tribe*, 411 U.S. at 148-149). *Mescalero Apache Tribe* was deemed to be not applicable *not because sovereign immunity shielded the tribe with regard to its off-reservation conduct but because the trust land in question had been " 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes."* *Potawatomi Tribe*, 498 U.S. at 511. *Potawatomi Tribe* says nothing about the suability of tribes for off-reservation activities where, unlike within their reservations, they are amenable to the full range of state regulatory and, by necessary inference, state adjudicatory jurisdiction absent contrary federal statutory or treaty provisions.

Petitioner and the United States' position, logically extended, consequently requires this Court to conclude that, while a State may regulate off-reservation conduct of tribes, it may not enforce that regulation directly

against them. That position makes no legal sense in view of the fact that authority to regulate a party's activity necessarily carries with it the right to compel prospective compliance or to seek a remedy, perhaps monetary in nature, for past violations unless the right to regulate is to be reduced to a meaningless abstraction. *See Rice v. Rehner*, 463 U.S. 713, 732 (1983); *Fort Belknap Indian Comm'y v. Mazurek*, 43 F.3d 428, 433-434 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 49 (1995). *Cf. Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 (1997). Petitioner and the United States' effort at separating the notion of tribal sovereign immunity from that of a State's authority to regulate the underlying conduct cannot be credited without creating an anomalous distinction between the power to regulate and the power to enforce that regulation.

One further argument must be addressed. Petitioner argues that sovereign immunity ought to be recognized in this case in furtherance of the "unique trust responsibility" of the United States to tribes. Brief for Petitioner at 27. A similar argument was made and rejected in *Mescalero Apache Tribe*. There it was argued that the Indian Reorganization Act required an off-reservation tribal business on federal land to be treated as a "federal instrumentality." This Court recognized that a tribe "taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people." 411 U.S. at 151 (footnote omitted). This did not convert the tribe to an arm of the federal government, however, for the intent and purpose of the Reorganization Act was "' to rehabilitate the Indian's economic life and to give him a chance to develop the

initiative destroyed by a century of oppression and paternalism.' " *Id.* at 152 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)). Further, the Court found that the aim of the Indian Reorganization Act was "to disentangle the tribes from the official bureaucracy." *Mescalero Apache Tribe*, 411 U.S. at 153. By determining that the tribe's off-reservation commercial enterprises would not be treated as arms of the federal government, this Court embraced the concept that the Indian Reorganization Act should be interpreted to disentangle the Indian tribes from federal law when acting off-reservation, to remove the vestiges of paternalism in such cases, and to enable Indians to "enter the white world on a footing of equal competition." *Id.* at 152 (quoting 78 Cong. Rec. 11,732 (1934)); *see also Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 578-581 (1928), *quoted in Mescalero Apache Tribe*, 411 U.S. at 153-155; *see generally* Bradley A. Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 240-52 (1991) (reviewing legislative history of Indian Reorganization Act). In short, federal policy announced in the Indian Reorganization Act does not support off-reservation sovereign immunity for tribal commercial enterprises but supports the competition of such tribes in the greater commercial world, on a basis of equal competition.[3]

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[3] The argument has been made that Congress addressed the problem when it allowed tribes to create corporations under § 477 which could be sued. *Mescalero Apache Tribe* answers this argument, stating that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." 411 U.S. at 157 n.13.

III.

POLICY REASONS MILITATE AGAINST THE RECOGNITION OF OFF-RESERVATION SOVEREIGN IMMUNITY WITH REGARD TO TRIBAL COMMERCIAL ENTERPRISES.

Petitioner and the United States argue, as we understand it, that it is good public policy for this Court to explicitly embrace the legal theory that each of the 320 Indian tribes in the United States[4] may conduct commercial enterprises off reservation without fear of incurring a civil liability in the courts of any of the fifty states.

Some of the description of the enormity of what Petitioner and the United States suggest is in order. First, there are over 320 recognized Indian tribes. As of December 1996, 184 tribes were operating between 275 and 280 bingo halls or casinos. Carroll, *National Gambling Impact Study Commission, What Hand Will They Deal Tribes*? XII American Indian Report 12, 13 (Aug. 1997). Some of these operations generate very substantial income for the tribes. The tribes, appropriately so, now seek to invest their funds in other enterprises. A recent article describes the Sault Ste. Marie Tribe as making a "respectable profit from their casinos, which posted about $267 million in gross revenues in 1995." Carroll, *Cashing in on Gaming Revenue, Tribes Use Cash From Casinos and Bingo Halls to Build Economy*, XII American Indian Report 16 (Aug. 1997). The article reports that the Sault Ste. Marie conducted "seventeen non-gaming businesses" in 1995. *Id.*

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[4] Perhaps each of the 200 plus Alaskan villages also should be added to this total, although neither Petitioner nor the United States discloses its position on that point.

Among these businesses were a construction company, a professional cleaning service, a "successful development company," a chain of hotels, and a joint venture involving the production of driveshafts. *Id.* at 17. (The article does not directly discuss the "reservation" or "Indian country" status of the lands on which these enterprises are located. Some of the lands appear to have such status while others, e.g., a hotel in Grand Rapids, do not.)

The question therefore becomes whether, in the investment of significant sums in various enterprises, the off-reservation commercial enterprises should then be subject to sovereign immunity. A tribe, of course, is not confined to commercial enterprises in its home state or area. Indeed, the business climate of another section of the country may well make it advisable to invest far from the reservation. The business options open to each one of the 320 tribes, perhaps in combination with other financial interests, are virtually limitless. Petitioner and the United States accordingly now ask this Court to issue an invitation to each of the federal tribes to establish commercial enterprises throughout the United States, even in states in which no "Indian country" now or has ever existed, and to sanction in advance tribal immunity from lawsuit for their activities.

Petitioner and the United States argue that a commercial enterprise dealing with a tribe can protect itself through careful commercial practices. *See, e.g.*, Brief for the United States at 27. And the latter suggests that a person or entity

> may simply refuse to deal with the sovereign that will not consent to suit, if it deems the likely gain not worth the risk or inconvenience

> (as it might, for example, if the sovereign had developed a reputation for failing to honor its obligations).

Id. This position ignores two important considerations. First, many of those dealing with Indian tribes in each of the fifty states will not possess the sophistication to recognize that an Indian tribe, or a tribal enterprise partaking of a tribe's immunity, is situated differently from other persons with whom they deal in the ordinary course of business. Second, the immunity endorsed by the United States is not limited to consensual commercial transactions; it encompasses any form of legal claim, whether by a private party in the form of tort action for negligence or a governmental entity seeking compliance with, and monetary relief for violation of, state law.

In sum, accepting Petitioner and the United States' view of tribal immunity means that tiny enclaves of immunity from state law against tribes qua tribes may be set up in each of the States by each of the 320 tribes. Each of these enterprises will be able to assert immunity from actions for breach of contract or for personal injury for damages. Each will be similarly immune for actions against their commercial enterprises with regard to wrongful termination of employment, labor disputes, and state discrimination suits.[5] The policy consequences of

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[5] This Court suggested in *Potawatomi Tribe*, 498 U.S. at 514, the applicability of remedial principles developed under *Ex parte Young*, 209 U.S. 123 (1908), with respect to tribal officers even as to on-reservation transactions. It also left open the possibility that retroactive relief might be available against them. *Potawatomi Tribe*, 498 U.S. at 514. Lower federal courts have applied the *Young* rationale to sustain awards of prospective relief in various contexts where *federal law*

Petitioner and the United States' position are therefore quite significant. *See generally* Comment, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173 (1988); submission of Lawrence Long, Chief Deputy Attorney General, State of South Dakota, S. Hrg. 104-694 (Sept. 24, 1996), pp. 88-130. Coupled with the unprincipled nature of the proposed extension of tribal sovereign immunity to off-reservation conduct otherwise subject to state regulation, these considerations counsel strongly in favor of affirming the judgment below.

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limitations on tribal authority were arguably exceeded. *See, e.g., Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1995); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 63 F.3d 1030, 1050-51 (5th Cir. 1995); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Comm'y*, 991 F.2d 458, 460 (8th Cir. 1993). Whether retroactive relief is available in such a situation – at least where the relief is effectively against the involved tribe – appears undecided. Moreover, exploration in federal court of *Potawatomi Tribe*'s implications with respect to retroactive relief in the context of a simple breach of contract claim such as that here, garden variety tortious conduct, or mere violation of state law has been made difficult because of the ordinary need to establish jurisdiction under 28 U.S.C. § 1331. *See, e.g., Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D.S.D. 1995) (no federal question jurisdiction where alleged breach of fiduciary duty arose under tribal, not federal, law); *Whiteco Metrocom Div. v. Yankton Sioux Tribe*, 902 F. Supp. 199, 202 (D.S.D. 1995) (breach of contract claim provided insufficient jurisdictional basis). The upshot is that the availability of *Young*-based prospective relief against tribal officers may be severely limited and, even if retroactive relief is assumed to be capable of being awarded against an officer or employee in his personal capacity, such relief may well prove unavailing as a practical matter because of the absence of either indemnification from a tribe or insurance.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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